FOR ARGUMENT.

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1184

E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,
Appellant,

vs.

WHITE MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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ARGUMENT

I. THE MINNESOTA PENSION ACT IS VALID UNDER THE *OLIVER* DOCTRINE.

White Motor relies upon a mischaracterization of the effect of the Minnesota Pension Act[1] on the White Motor pension plan and on an exceptionally expansive interpretation of *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) in urging this Court to rule the Minnesota Pension Act preempted.

A. White Motor Misstates The Effect Of The Minnesota Pension Act.

White Motor and the United States Chamber of Commerce[2] assert that the Minnesota Pension Act operates so as to radically change the bargained-for pension plan. Indeed, the Chamber asserts that the Minnesota Act provides for "state mandated benefits." Chamber of Commerce Br. at 10 n. 8; *see* White Br. at 8.

[1] White Motor also alleges that the Minnesota Pension Act was directed solely at it. (White Br. at 7, 19 n. 10) This argument was not accepted by either of the courts below and has been explicitly rejected in Fleck v. Spannaus, Civ. No. 3-75-178 (D. Minn., Sept. 2, 1977, three-judge court), where White Motor participated as an amicus curiae. That court said

> It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan. However, Allied's contention that the Pension Act was aimed solely at White Motor retirees is totally unfounded. There is absolutely no evidence from the legislative history or debates on the Pension Act to support Allied's claim that the Act was aimed solely at White Motor Corporation.

[2] The United States Chamber of Commerce has filed a Motion For Leave to File A Brief Amicus Curiae and has submitted a Brief Amicus Curiae. Since the State does not yet know whether the Chamber of Commerce will be allowed to file its brief, the State will address several of the main points outlined in the Chamber of Commerce brief.

This is incorrect. The Minnesota Pension Act does not mandate any benefits. The decision of whether to establish a pension plan and specified benefit levels in such a plan are exclusively matters between the employer and the employees. The Minnesota Act simply provides that once specified benefit levels are agreed to in a pension plan, covered employees are to receive those expected benefits which they are entitled to.[3]

The Act, in the context of this case, serves to give effect to the specified benefit levels agreed to in the pension plan while nullifying the company's liability disclaimer which itself, if given effect, operates to render meaningless the benefits delineated in the pension plan. There is obviously an internal inconsistency in the White Motor pension plan because on the one hand it affirmatively provides for specified benefit levels, thus apparently promising workers pension benefits, but on the other hand absolves the company of all liability even though the plan is seriously underfunded.[4]

White Motor also contends that since the Minnesota Act provides for slightly different vesting provisions than the pension plan, the Act has the "effect of destroying [the] pension agreements." (White Br. at 13). This is hyperbole. The Min-

[3] Pension benefits are deferred compensation. *See* Daniel v. Teamsters Union, 561 F.2d 1223, 1232 (7th Cir. 1977); Craig v. Bemis Co., Inc., 517 F.2d 677, 680 (5th Cir. 1975); Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); Hurd v. Hutnik, 419 F.Supp. 630 (D.N.J. 1976).

[4] *See generally* discussion in Brief For the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 22. (The AFL-CIO has filed a Motion For Leave To File A Brief Amicus Curiae and has submitted a Brief Amicus Curiae.)

White Motor's claim that the liability disclaimer is based on a quid pro quo bargaining agreement, (White Br. at 12-13) is highly speculative. Although White Motor does not cite any authority for its bald assertion, it presumably is relying on the affidavit of H. Herbert Phillips, a company Vice-President. App. at 21-32. Significantly, even White Motor does not claim that there was any quid pro quo arrangement when the liability disclaimer was inserted into the pension plan in 1950.

nesota Act grants workers vested rights after ten years of employment; whereas the pension plan granted vested rights if a worker had ten years of service and was at least 40 years of age. Not more than 44 terminated employees out of 1518 individuals potentially covered by the Act had 10 years of service but had not attained age 40 at the time of termination. App. at 92. Thus, the difference in vesting times between the Act and the pension plan is minor and involves relatively few terminated workers.[5]

B. *Oliver*, Unlike The Minnesota Act, Involved A State Antitrust Law Which Virtually Destroyed The Essence Of The Bargaining Agreement.

White Motor blithely asserts that *Oliver* is "simple and easy" to apply (White Br. at 18) and asks this Court to give an uncritical adherence to *Oliver's* broadest implications. However, a balanced reading of *Oliver* in conjunction with an understanding of the effect of the Minnesota Pension Act on the White Motor Pension Plan establishes that the effect of the Ohio antitrust law in *Oliver* was far more damaging

[5] White Motor further argues that the Minnesota Pension Act "renders meaningless" the Guarantee letter and claims that the Minnesota Pension Act "requires an immediate satisfaction of a pension funding charge in excess of $19,000,000" (White Br. at 13). Those assertions are incorrect.

Under the Minnesota Act, the pension funding charge must ultimately take into account any partial funding the Company has already agreed to, *see* Minn. Stat. § 181B.03-06 (1976), and the Company's approximately $7,000,000 commitment, *see* App. at 172-73, will, if paid, be subtracted from the initial pension funding charge of $19,000,000. In addition, the new pension plan created for the Hopkins plant, *see* App. at 111 n. 5, and payments made due to the arbitrators award will further substantially reduce the initial funding charge. It appears that the funding charge will ultimately be approximately $6,000,000-$8,000,000. Furthermore, the pension funding charge cannot be certified or become due for payment until the completion of the administrative proceedings which have been held in abeyance pending determination of this appeal. Minn. Stat. § 181B.09-11 (1976); State Br. at 8-9.

to the essence of the bargaining agreement than the effect of the Minnesota Pension Act on the pension plan herein.

In *Oliver*, the Ohio courts' application of the state antitrust law operated to absolutely preclude negotiation or agreement on terms and conditions regulating minimum rental and other lease terms when a truck was leased to a carrier by an owner who then drives his truck for the carrier. This provision was incorporated into the bargaining agreement to preclude employers from circumventing the agreed upon wage scale by paying owner-drivers below market lease amounts or insufficient amounts for maintenance. Thus, the provision of the bargaining agreement struck down by the Ohio courts was integrally tied into the wage package of the bargaining agreement and therefore had the effect of eviscerating the entire negotiated wage scale. It was because of this drastic interference with the very heart of the bargaining agreement that the *Oliver* Court reversed the Ohio courts and struck down the state antitrust law.

The Minnesota Pension Act, however, contrary to White Motor's and the Chamber of Commerce's assertions does not go to the heart of the bargaining agreement nor frustrate the framework for the bargaining process established by Congress. The Act allows the parties freely to decide whether they wish to establish a pension plan and, if so, to specify benefit levels. The Act requires that a company which bargains to pay a certain level of benefits must pay those benefits notwithstanding any inconsistent disclaimer in the plan to the contrary.[6]

[6] *See also* discussion of vesting rights *supra*; State Br. at 19 n. 41.

White Motor has completely mischaracterized the State's argument concerning mandatory subjects of collective bargaining, *see* White Br. at 20; the State refers the Court to the State Br. at 22 n. 45. In addition, White has misstated the State's argument concerning the relationship of the Minnesota Pension Act to the collective bargaining process, *see* White Br. at 14-15. For the State's analysis on this point, *see* State Br. at 16-28.

II. THE PENSION DISCLOSURE ACT EXPRESSLY RESERVED TO THE STATES AUTHORITY TO REGULATE THE ADMINISTRATION AND DISSOLUTION OF PENSION PLANS.

White Motor asserts that the provision in the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, (Pension Disclosure Act) allowing the states to retain the power to regulate the "operation or administration" of pension plans, § 10b, 72 Stat. 1003, should be narrowly construed so as to oust the states from regulating substantive aspects of pension plans. (White Br. at 32-40). In the alternative, White Motor asserts that this Court took that power from the states in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956) and *California v. Taylor*, 353 U.S. 553 (1957). These arguments reflect a fundamental misunderstanding of the deference this Court should give to expressed Congressional intent.

The State initially observes that White Motor and the Chamber of Commerce claim that state power to regulate any provisions of collectively bargained for pension plans is preempted absent "unambiguous congressional intent." (Chamber of Commerce Br. at 16; White Br. at 34-35). Although the state believes that the Pension Disclosure Act does indicate in clear and unambiguous terms that states had the power prior to ERISA to regulate certain aspects of private collectively bargained for pension plans, the Chamber of Commerce and White Motor have misstated the basic labor law preemption standard to be applied on matters of Congressional intent.

In cases involving labor law preemption, this Court has made it clear that "[t]he purpose of Congress [is] the ultimate touchstone[,]" *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963), and

> [t]he constitutional principles of pre-emption, in whatever field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.

Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 285-86 (1971).

Furthermore, "affirmative indications" of congressional intent not to preempt are sufficient if congressional intent is not entirely clear.[7] *See Lockridge, supra*, 403 U.S. at 297; *see also San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748-49 (1942).

White Motor contends that by enacting the Pension Disclosure Act, Congress did not by that Act address the problem of the substantive aspects of employee pension plans. (White Br. at 35). That is, of course, precisely the point of the State's argument; Congress, although fully aware of the problems raised by inadequate funding and vesting provisions in private pension plans, *see* State Br. at 29-31, only chose to require certain limited types of disclosure in the Pension Disclosure Act. It affirmatively and explicitly left to the states the power to regulate private pension plans. Section 10(b), 72 Stat. 1003.

Indeed, not only does the Pension Disclosure Act expressly provide for state regulation of pension plans, but it actually encourages such regulation. For example, section 10(a) of the Act provided for the filing of certain reports required by the

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[7] Indeed, in considering Congressional intent, the Chamber of Commerce fashions a rule of uniformity which would virtually read principles of federalism out of the United States Constitution. But as Mr. Justice White and the Chief Justice have noted, "Congress has not federalized the entire law of labor relations." Lockridge, *supra*, 403 U.S. at 309 (White, J., dissenting).

Act with state regulatory agencies "to permit a coordination between the Federal and State Governments in carrying out their respective obligations." S. Rep. No. 1440, 85th Cong. 2nd Sess., 1958 U.S. Code Cong. and Admin. News 4137, 4168.[8]

White Motor's assertion that the only state regulation contemplated by the Pension Disclosure Act was that relating to the "mechanics of implementing and managing a plan" is utterly without support. Such a narrow and contorted reading of the congressional intent exemplified in the Pension Disclosure Act is not supported by the express language of section 10(b) of the Act and its legislative history nor the legislative history of ERISA. *See generally* State Br. at 28-39. Furthermore, White Motor's constricted approach to congressional intent is not consonant with the reasoned deference to expressed congressional intent mandated by this Court and the presumption of validity that attaches to all legislation including state legislation.[9]

Finally, White Motor claims that state regulation of pension plans was preempted prior to enactment of the Pension Disclosure Act by virtue of this Court's decisions in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956) and *California v. Taylor*, 353 U.S. 553 (1957). However, neither *Hanson* nor *Taylor* had anything whatsoever to do with pen-

[8] *See generally* discussion in Brief For the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 22.

[9] Indeed, White Motor's concession that the states, prior to ERISA, had the power to regulate some aspects of bargained-for pension plans is curious. A review of the White Motor pension plan reveals that much of it is devoted to such things as administration, term definitions, appointment of actuaries, funding, etc. To attempt to sort out substantive provisions from administrative or mechanical provisions as White Motor apparently suggests is virtually impossible. Indeed, the section of the Plan headed "Administration of Plan," relates to such items as indemnity, disbursement of funds, etc.; *see* § 7 of Plan.

sion regulation. Rather, this Court held in *Hanson* that a "right to work" provision in the Nebraska Constitution was preempted by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, because of a specific provision of the Act that both expressly authorizes the very types of contract provisions prohibited by Nebraska law and expressly preempts any state law to the contrary. *See* 45 U.S.C. § 152, subd. 11. There was, then, a direct and irreconcilable conflict between the state and federal law that could be resolved only by preemption. Additionally, the substance of the provision was related directly to a matter of fundamental concern in federal labor policy—the right to join or not join a union.

California v. Taylor, 353 U.S. 553 (1957), held that a state-owned railroad was subject to the Railway Labor Act and that, as such, state civil service laws that prohibited state employees from organizing and collectively bargaining were preempted from application to the railroad's employees. Thus, as in *Hanson*, the state regulation prohibited the very activity that is the subject of federal labor policy.

The State cannot perceive how either of these cases in any way constricted the power of the states to regulate pension plans. Indeed, there is absolutely no evidence in the legislative history of the Pension Disclosure Act, or anywhere else, that Congress thought the *Hanson* or *Taylor* cases preempted the state regulation of pension plans that Congress reaffirmed in the Pension Disclosure Act. There was thus no reason for Congress to affirmatively cede such power to the state pursuant to 29 U.S.C. § 164(c)(2) as White Motor suggests (White Br. at 34) since the Congress obviously believed that states already possessed this regulatory power.

III. THE MINNESOTA PENSION ACT IS AN APPROPRIATE EXERCISE OF THE STATE'S POLICE POWER TO PROTECT WORKERS IN THE CONTEXT OF THE EMPLOYMENT RELATIONSHIP.

Conjuring up a litany of woes certain to result if this Court reaffirms Minnesota's exercise of its traditional police power to protect workers in the context of the employment relationship, White Motor and the Chamber of Commerce contend that this police power argument has been rejected by the Court in *Bus Employees v. Missouri*, 374 U.S. 74 (1963) and *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). These two cases are singularly inapposite.

Both cases involved state attempts to absolutely prohibit strikes in bus companies based on the argument that the welfare of the general citizenry was at stake. Thus, although bus service was unquestionably important to the general public, that interest was outweighed by the nullification of one of labor's most cherished rights under the NLRA, the right to strike. Significantly, the states were not acting to protect the workers but rather were articulating a concern for the general public.

However, protection for the general public was not the traditional police power concept reaffirmed in *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) where the Court ruled that the Immigration and Nationality Act did not preempt a California provision prohibiting an employer under certain circumstances from employing illegal aliens. In *DeCanas*, this Court spoke directly to the police power of the state to regulate "the employment relationship to protect workers[.]" 424 U.S. at 356. The two *Bus Employees* cases obviously involved neither the "employment relationship" nor were the states' actions therein

designed to "protect workers." The Minnesota Pension Act, however, is keyed directly into the employment relationship at the point it terminates and protects workers from the devastating effects of the termination of inadequately funded pension plans. *See* State Br. at 5-7 and n. 5.

White Motor's contention that *DeCanas* is not relevant since it did not involve the NLRA, ignores reality. In recognizing the police power of the states in areas involving the "employment relationship," this Court certainly was not oblivious to the fact that a substantial percentage of workers are unionized or may desire to become unionized and that the NLRA, therefore, permeates the entire employment relationship.[10]

White Motor and the Chamber of Commerce also contend that reaffirming the state's traditional police power to protect workers in the area of the employment relationship would eviscerate labor law preemption. (White Br. at 28; Chamber of Commerce Br. at 15-25 and n. 14.) They arrive at this conclusion by suggesting the novel proposition that states could legislate maximum standards as well as minimum standards under the police power doctrine.

However, the enactment of certain basic minimum standards by a state is at the heart of its police power "to protect workers." Such minimums[11] leave the parties free to bar-

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[10] Similarly, White's claim that this Court's failure to cite DeCanas in Lodge 76, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), presupposes that DeCanas "affect[ed] the principles of labor law preemption." (White Br. at 25). That is incorrect. DeCanas simply restated the traditional police power of the state in the employment relationship. Furthermore, Machinists did not involve an attempt on the part of the Wisconsin Board to "protect workers" through its police power and DeCanas was therefore inapposite to that case.

[11] *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 218(a); Occupational Health and Safety Act, 29 U.S.C. § 667; Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*; Coal Mines Health & Safety Act, 30 U.S.C. §§ 801, 953.

gain collectively from these minimums to whatever level the parties mutually agree upon. Any attempt to legislate maximums, *e.g.* in the areas of wages or pensions, hardly could be construed as legislation "to protect workers" and thus would be outside the states' police power. Furthermore, such maximums could virtually nullify the collective bargaining process.

Contrary to White Motor's statement that the Minnesota Pension Act is not actually setting "minimums" (White Br. at 26), the Act quite simply requires that minimum standards of vesting and funding be met in the event that a pension plan is terminated.

The Briefs of the Chamber of Commerce and White Motor are demands for national uniformity in all laws affecting the employment relationship because diversity of laws may make some collective bargaining "more difficult." (Chamber of Commerce Br. at 23.)

If this Court's statement in *Garner v. Teamsters*, 346 U.S. 485, 488 (1953) that the NLRA "leaves much to the states," is to retain any vitality, then under basic principles of federalism, some diversity in state laws must be accepted. Although the Chamber of Commerce and White Motor view this diversity negatively, the State submits that such diversity is at the heart of the federal-state relationship and that the nation is healthier for that diversity even if it occasionally does cause inconvenience. As Justice Brandeis once observed,

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion).

IV. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the State's original brief to the Court and the Brief for the United States as Amicus Curiae, the decision below should be reversed.

Respectfully submitted,

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